BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)))))))))	PCB No. 08-25 (Permit Appeal – Land)

NOTICE OF FILING

To: Brian Meginnes
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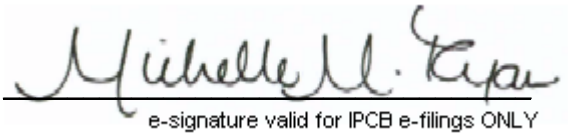
PLEASE TAKE NOTICE that on this date I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois the following instrument(s) entitled POST-HEARING BRIEF OF RESPONDENT.

Respectfully Submitted,



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Dated: November 28, 2007

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	))))))))))	PCB No. 08-25 (Permit Appeal – Land)

POST-HEARING BRIEF OF RESPONDENT,
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES the Respondent, Illinois Environmental Protection Agency ("IEPA"), by and through its attorney, Michelle M. Ryan, Special Assistant Attorney General, and states as follows:

INTRODUCTION

This is an appeal of a denial letter dated August 30, 2007, wherein IEPA announced its determination that local siting approval was required pursuant to Section 39.2 of the Environmental Protection Act, 415 ILCS 5/39.2 (2006) ("Act"), prior to issuance of the requested permit modification, Log No. B-24-M-58. Due to this threshold issue, IEPA did not complete a technical review of the application.[1] Transcript, pp. 29-30.

At hearing, the parties filed a stipulation of facts as Joint Exhibit 1, which will not be restated here. Although the parties agree on all the material facts in this case, we reach opposite

[1] IEPA denied this application under the authority of 35 Ill. Adm. Code 705.128(b), prior to initiating the formal application modification and review process found in 35 Ill. Adm. Code 705.128(c) and 35 Ill. Adm. Code 705.Appendix A. Although disputing the appropriateness of the relief requested, IEPA concurs with the Petitioner that the proper request to be made at this stage is for remand to IEPA for full technical review, rather than for the Pollution Control Board ("Board") to issue the permit over IEPA's denial.

conclusions on the application of law to those facts. IEPA acknowledges that the law applicable to the Peoria Disposal Company ("PDC") facility in general can be misleading when applied to the sole issue in this case, which is the need for local siting approval. This brief will endeavor to assist the Board in focusing on those portions of the law that are relevant to the issue at hand.

ISSUE PRESENTED

Whether local siting approval is required prior to issuance of a permit modification to expand the PDC facility through construction of the proposed Residual Waste Landfill ("RWL").

ARGUMENT

PETITIONER IS NOT EXEMPT FROM LOCAL SITING APPROVAL, BECAUSE IT IS NOT A WASTE "GENERATOR" FOR THAT PURPOSE

The requirement of local siting approval is defined in several parts throughout interrelated sections of the Act. Section 39(c) initially limits IEPA's authority to grant a permit, and states in relevant part: "[N]o permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved…in accordance with Section 39.2 of this Act." The term "new pollution control facility" is defined in Section 3.330(b) of the Act to include three circumstances. The situation applicable in this case is found in Section 3.330(b)(2): "the area of expansion beyond the boundary of a currently permitted pollution control facility." It is undisputed that PDC operates a currently permitted pollution control facility (Joint Exhibit 1 at #1), and that the proposed RWL would represent an expansion beyond the vertical, horizontal and capacity-related boundaries of that permitted facility (Joint Exhibit 1 at #3 and #5; Petitioner's Brief at 2).

However, in order to qualify as a "new pollution control facility," a site must logically first be defined as a "pollution control facility" pursuant to Section 3.330(a). Under this section, landfills are classified as pollution control facilities, unless they meet one of the listed exemptions. The only exemption that Petitioner is attempting to claim is the part of the characterization that states:

> The following are not pollution control facilities:…(3) sites or facilities used by any person conducting a …waste disposal…operation…*for wastes generated by such person's own activities*, when such wastes are…disposed of…within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person…."

Section 3.330(a)(3) of the Act (emphasis added).

It is in the interpretation of the emphasized phrase "for wastes generated by such person's own activities" that IEPA disagrees with Petitioner.

The Act defines a "generator" in Section 3.205 as "any person whose act or process *produces* waste" (emphasis added). (As explained in further detail below, it is this definition, and no other, that controls in this case.) The term "produce" is not defined in the Act, but a dictionary definition includes, "1. To bring forth; yield. 2. To create by mental or physical effort. 3. To manufacture. 4. To cause to occur or exist; give rise to. …" AMERICAN HERITAGE DICTIONARY 988 (2d College Ed. 1991). This is the flaw in Petitioner's analysis: PDC does not "produce" waste by bringing it forth, creating it, manufacturing it, or causing it to exist. PDC *treats* the waste brought to its facility by the people who did "produce" it. The fact that PDC changes the physical and/or chemical nature of the waste it receives into its Waste Stabilization Facility ("WSF") defines PDC as a "treater," not a "generator" under this Section of the Act. *See* Section 3.505 (definition of "treatment"). Further, the complete phrase in Section 3.330(a)(3) is "for wastes generated *by such person's own activities*" (emphasis added). This

phrase implies that there is only one "person" involved in the generation of this category of waste. For this reason, IEPA submits that the fact that the waste entering the WSF comes from off-site (Transcript, pp. 22-23) is relevant to the "generator" of the waste coming out of that treatment unit. PDC's "own activities," which include adding reagents, serve to treat other people's waste, not to generate it.

SECTION 39(H) OF THE ACT SUPPORTS IEPA'S INTERPRETATION

Section 39(h) of the Act does not provide Petitioner with the altered definition of the term "generator" that it seeks for this case. Section 39(h) applies solely to hazardous waste stream authorizations, not local siting review.

By its own terms, Section 39(h) is limited: "*For purposes of this subsection* (h), the term "generator" has the meaning given to it in Section 3.205 of the Act, unless: (1) the hazardous waste is treated…prior to disposal, in which case the last person who treats…the hazardous waste prior to disposal is the generator" (emphasis added). Clearly, the statute defines PDC as the "generator" of the residual waste from the WSF, but *only for purposes of waste stream authorizations*. In the case of *Envirite Corp. v. Illinois EPA*, PCB No. 91-152 (December 19, 1991), cited by Petitioner in its brief (pp. 17-18), the Board likewise held that with respect to treated residue, PDC was the "'generator' of the specific hazardous waste stream and the owner and operator of the disposal site *for purposes of Section 39(h)*" *Id.* at 5 (emphasis added). The Supreme Court in upholding the Board was less clear, stating only that PDC "was the generator of this specific hazardous waste stream." *Envirite Corp. v. Illinois EPA*, 198 Ill. Dec. 424, 427 (1994). However, in agreeing with the Board on the issue presented, the Supreme Court clearly did not expand the definition, as Petitioner suggests, but concurred in the Board's interpretation of the issue for purposes of 39(h) waste stream authorizations. While waste stream

authorizations were previously handled by IEPA as separate documents, [2] they are now incorporated into the permit for each facility. Transcript, p. 31. Therefore, the precise issues raised in the *Envirite* case would no longer be raised under the current procedures.

More importantly, a careful reading of the definition in Section 39(h) demonstrates that IEPA's interpretation of the definition of "generator" is accurate for purposes of local siting approval. Section 39(h) states that the standard definition in Section 3.205 of the Act applies for purposes of that subsection, unless an exemption is met. The exemption that Petitioner tries to claim is the following: "unless (1) the hazardous waste is treated…prior to disposal, in which case the last person who treats…the hazardous waste prior to disposal is the generator." Section 39(h). IEPA has already conceded that PDC accurately meets this exemption for purposes of waste stream authorization. However, the fact that this description is stated here as an *exemption* to the standard definition found in Section 3.205 of the Act means that this description is *not* otherwise a part of that original definition of "generator." To argue that this description is already contained within the Section 3.205 definition of "generator" would render the exemption in Section 39(h) meaningless. In this situation, the exemption proves the rule. Therefore, the fact that PDC meets the Section 39(h) *exemption* to the definition of "generator" in Section 3.205 means that it does not otherwise meet that standard definition for other purposes under the Act, including local siting approval.

Petitioner claims that "there is no valid distinction to be made under the law" between the possible definitions of "generator" found in the Act (Petitioner's Brief at 19), and further that "[t]here is no contextual indication…that the legislature intended 'generate' to mean anything different in Section 39(h) of the Act than it does in Section 3.330(a)(3)" (Petitioner's Brief at

[2] All of the "permits" referenced on pages 22-23 of Petitioner's Brief are wastestream authorizations from 1989.

20). This claim is patently false. It is the statute itself that clearly provides the distinction. Rather than attempting to "administratively rewrite the statute," and to "write a new definition into the Act" as claimed by Petitioner (Petitioner's Brief at 14 and 28), IEPA merely advocates the precise interpretation and application of the actual language contained in the Act, as opposed to the glossing over of defined terms that Petitioner attempts in its brief.

THE RCRA DEFINITION OF A "GENERATOR" IS IRRELEVANT TO LOCAL SITING

Similarly, the definition of "generator" in the Resource Conservation and Recovery Act ("RCRA"), as adopted by the Board in 35 Ill. Adm. Code 720.110, is distinct from the definition in the Environmental Protection Act, and therefore completely irrelevant to the Act's requirement for local siting approval. Contrary to Petitioner's contentions, IEPA is not arguing that the RCRA definition is "subservient or subject to the IEPA's definitions" (Petitioner's brief at 21). Rather, IEPA asserts that RCRA and the local siting requirement are separately enacted laws, with separate policy concerns. Divergent statutory definitions of the identical word, "generator," need not be seen as inconsistent, when each definition meets the purpose of the law for which it was promulgated.

RCRA was designed as a cradle-to-grave system to monitor and control hazardous waste. The more people that qualify as "generators," the more people are subject to regulation, and the more consistent the management of hazardous waste would be across the country. Therefore, a broad reading of the term "generator" in RCRA is appropriate to its goal of directing the life and death of hazardous waste.

The siting requirement was enacted to give local communities input on the location of waste management facilities, both hazardous and non-hazardous. Section 39.2 provides several criteria that local governments must consider, including the needs of the area, traffic patterns,

and consistency with local waste management plans. The aforementioned are all strictly local concerns, and while valid, are of no interest to the policies underlying the RCRA program.

Section 3.205 defines a "generator" as "any person whose act or process produces waste" RCRA has a broader definition, which includes not only the previously quoted language, but additionally any person "whose act first causes a hazardous waste to become subject to regulation." 35 Ill. Adm. Code 720.110. Moreover, other activities can make a non-generator subject to the RCRA generator requirements, such as when an owner or operator initiates a shipment of hazardous waste from a treatment, storage, or disposal facility. 35 Ill. Adm. Code 722.110(h). Therefore, it is logically possible for a person to be a "generator" or subject to the generator requirements of RCRA, without necessarily meeting the definition of a "generator" in the Act. Whether PDC is a "generator" for purposes of RCRA, or simply needs to meet the RCRA generator requirements for annual reports, manifesting, locator logs, Land Disposal Restriction notifications or other items, is not material in this case. Nothing regarding PDC's potential generator status under RCRA is determinative for purposes of local siting approval. The siting law was enacted by the General Assembly to protect local interests, with the definition of "generator" in Section 3.205 already in place. Attempting to intrude upon that goal by inserting definitions from federal laws with dissimilar policy concerns would thwart the intent of the legislature.

PRIOR PERMIT DECISIONS AND CASELAW DO NOT MANDATE THE RELIEF REQUESTED

The 1993 Northwestern Steel and Wire Company ("NSW") permit, referenced in the permit application in this case, is a good example of the proper application of the Section 3.330(a)(3) exemption from the definition of a pollution control facility. NSW was primarily engaged in the business of producing steel, as its name suggests. As a natural consequence of

this manufacturing operation, it produced hazardous and non-hazardous wastes. This was waste that was being created, treated, and then disposed of on site. Transcript, p. 33. Looking at the criteria in Section 39.2, it is easy to see why the legislature chose to exempt this activity from the local siting review process. This waste was already being produced at the site, so the local concerns regarding public health and environmental contact with the wastes would likely be similar whether the material remained on site or was later moved elsewhere. Issues such as traffic patterns and the waste management needs of the area would likely weigh in favor of on-site disposal over off-site transport. Zoning requirements would apply to the manufacturing facility itself. Therefore, the need for additional local approval seems lessened in such a case. In contrast, PDC is taking in hazardous waste from generators across the State and beyond, and bringing those wastes to Peoria County for treatment and/or disposal. The local concern over these activities would clearly be increased over the maintenance of waste materials on the site where they were originally created.

From the information available in the record on appeal, the 1990 Envirite situation would appear to be much more similar to that now faced by Petitioner. Unfortunately, because there is not a full record of the permit decision in that case, it is difficult to understand all of the considerations that went into that decision. However, a few important points can be noted. As demonstrated by testimony, the Envirite decision was consistent with other contemporary decisions, all of which occurred over 15 years ago. Transcript, p. 35. Since that time, IEPA's interpretation has evolved to refocus consideration on the concerns of the local community. *Id.* A decision made by IEPA in 1990, while certainly instructive, is not an inexorable command on all future decision-making. The language of the statute may not have changed significantly, but that fact does not stipulate that there is only one possible interpretation of that language. IEPA

maintains that its current interpretation is more consistent with the defined terms of the statute, as well as the intent of the legislature in enacting the local siting law.

It is clear from the information in our record regarding the Envirite decision that there was some vacillation within IEPA on whether local siting approval would be required before the final decision was made. R1313-1316. One thing conspicuously absent from the record is any evidence of local opposition to or support for the Envirite application. This lack of written comment could mean various things, but it gives the impression that communities also have evolved in their interest for local control over the location of waste management facilities. In the present case, dozens of concerned citizens attended the hearing, and fifteen of them gave comments in support of the IEPA decision to require siting in this case. It is clear that local residents in 2007 are interested in exercising the right to local siting review given to them by the General Assembly many years ago.

The other cases cited by Petitioner in its brief are not on point in this case. In *Northern Trust Co. v. County of Lake*, 288 Ill. Dec 701 (2d Dist. 2004), the appellate court was affirming the dismissal of a zoning question. The entire analysis by the court of this issue is contained in the first quoted paragraph on page 29 of Petitioner's Brief. Due to the complete lack of constructive evaluation of the matter, this case is particularly unhelpful in determining an appropriate interpretation of the law. The case of *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994), involved the RCRA definition of "generator" and the exemptions therefrom, which as stated above, are not relevant in this case.

CONCLUSION

Petitioner seeks to redefine itself as a generator to avoid the proven failure of its attempts at obtaining local siting approval. But treatment does not a generator make. If it did, the logical

conclusion of the argument would be that *any* disposal facility that takes in waste would only need to provide some treatment in order to be considered a "generator" under the Act. Any landfill in the State could take all the waste it receives, mix it with some of its own material, and be exempt from local siting approval for all waste in the landfill. This would easily lead to a market in "waste laundering," where generators could rid themselves of the stigma of hazardous waste generation, or non-hazardous disposal facilities could even avoid permitting altogether under Section 21(d)(1) of the Act. This system would certainly be cheaper and less onerous for some parties, but it would be a disaster for the human health and the environment, and completely inconsistent with the purposes of the Act.

WHEREFORE, for the foregoing reasons, Respondent, Illinois Environmental Protection Agency, respectfully requests that the Board DENY the petition for review in this case and uphold IEPA's determination that local siting approval is required for this application.

Respectfully Submitted,

DATED: November 28, 2007

Michelle M. Ryan
Special Assistant Attorney General

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PROOF OF SERVICE

I hereby certify that I did on the 28th day of November, 2007, send by U.S. Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instrument(s) entitled POST-HEARING BRIEF OF RESPONDENT

To: Brian Meginnes
Janaki Nair
Elias, Meginnes, Riffle & Seghetti, P.C.
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Peoria, Illinois 61602-1611

Claire Manning
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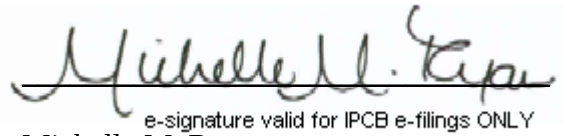
and an electronic copy of the same foregoing instrument on the same date via electronic filing

To: John Therriault, Acting Clerk
Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601



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